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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	
Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service;	CC Docket No. 92-297 [RM-7872; RM-7722]
Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules;	
Suite 12 Group Petition for Pioneer's Preference	PP-22
University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS

(CONTINUED)

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Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1992), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following reply comments opposing the preemptive aspects of the Commission's "Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration" ("NPRM") as adopted on December 10, 1992, and released on January 8, 1993, in the above-captioned proceeding.

In support of its comments, NARUC states as follows:

I. INTEREST OF NARUC

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its membership includes governmental bodies engaged in the

II. BACKGROUND

This NPRM proposes redesignation of use of the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service. Specifically, the FCC proposes to grant two licenses per service area, adopt technical rules "...to accommodate multipoint video programming distribution, wideband video, data and other telecommunications services," require that service be available to 90% of the residents within a service area within 3 years, adopt one-day-filing, use lotteries or auctions to select licensees, and employ minority and diversity of ownership preferences. NPRM, para. 3, mimeo at 3. The FCC initiated this proceeding in response to petitions filed by, inter alia, Suite 12 Group ("Suite 12"), and Video/Phone Systems, Inc. ("Video/Phone"). Suite 12 states that its cellular-based technology is "capable of immediately providing interactive high quality video, voice and data services.." Two-way communication channels are inserted between the video channels. Each "cell" is 6 to 12 miles in diameter. Video/Phone proposes a "Local Wireless Broadband Service" to respond to growing demand for video communications services such as video-conferencing, telecommuting, telemedicine, and education. NPRM, paras. 9-10, mimeo at 4-5.

In the NPRM, the FCC asks for comment on, inter alia, (1) allowing licensees to elect common or private status for video and non-video "PCS" type applications, including whether LMDS can be classified as a Section 332 "private land mobile radio service," and (2) preempting state oversight of non-common and common carrier LMDS video and non-video service. NPRM, Paras. 25-29, mimeo at 10-12.

III. DISCUSSION

In accessing the record that must form the basis of any Commission action in this proceeding, NARUC determined that, of the seventy-one parties that filed initial comments in this proceeding, it appears that only nineteen address these two issues. Many of these commentors's submissions are of limited utility to, i.e., provide little record support for, the Commission in reaching a decision as they eschew any discussion of the legal basis for Commission action and merely state, in conclusory fashion, preferences concerning the policy the Commission should adopt.[1]

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[1] Indeed, some did not even attempt to provide a supporting rationale for their recommended policy choices. See, e.g., the comments filed by Joseph D. Carney and Associates, at pages 1-2, which only state that "..LMDS Licensees should be allowed to elect common or non-common carrier status to best suite {misspelled/wrong word in the original} the marketplace. LMDS licenses {licensees?} should be able to elect alternatives for different services, e.g., one status for video, one status for other signals." Others made more of an effort. See, e.g., the comments filed by (a) M3 Illinois Telecommunications Corporation, at page 4, suggesting licensees be allowed to select status on a channel-by-channel/cell-by-cell basis and recommending designation of a single branch to coordinate elections to "...facilitate development of these services.";(b) Eagle Engineering and Communications Group, Inc., at pages 3-4, stating its belief that LMDS should be non-common carrier to assure that licensees have needed "..flexibility to alter the mix of services within any given cells as the need for differing services changes" and because it may not be "economically feasible to offer non-discriminatory access to all of the public to the non-video channel services.";(c) Cascom International, Inc., at pages 3-4, suggesting LMDS should be non-common carrier, and, agreeing with Eagle, that, due to the expected high initial demand for video services, it may not be economically feasible to offer non-discriminatory access to the non-video services;(d) NYNEX Mobile Communications Company, at page 6, supporting the FCC's proposal for choice noting its need for flexibility to meet customer requirements; (e) AMERITECH, at pages 4-5, and Pacific Telesis Group, at page 3, supporting the FCC's approach of imposing less regulation on LMDS operators and asking for equal regulatory treatment of all LMDS operators including LECs.

A. LMDS LICENSEE ELECTION OF STATUS:

Citing, inter alia, Wold Communications Inc. v. FCC ("Wold"), 735 F.2d 1465 (D.C. Cir. 1984), the FCC proposes that "...LMDS licensees choose whether they will operate as a common or non-common carrier on a channel-by-channel and/or cell-by-cell basis," NPRM, para. 26, mimeo at 10, and seeks comment on (a) whether "non-video" services should be regulated as common carriage, Id., (b) application of its video dial tone polices to common carriers providing video services over LMDS, Id. at note 9, and (c) whether LMDS operators could be classified as common carriers reselling telephone exchange service, or as private land mobile radio licensees, and the jurisdictional implications of such classification for LECs. Id. at note 10.

1. The FCC does not have unfettered discretion to confer or not confer common carrier status on a given entity.

NARUC generally agrees with the comments of BellSouth, at pages 3-5, Sprint, at pages 3-5, Rochester Telephone, at page 6, and others, that the FCC does not have unfettered discretion to confer or not confer common carrier status on a given entity or service. Indeed, Section 332 of the Communications Act, as the FCC has essentially acknowledged in Footnote 10 of the NPRM, limits the FCC's authority to classify Section 153(gg) "mobile services", while the NARUC I case, National Association Of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (1976), cert. denied, 425 U.S. 992 (1976), specifically rejects those parts of the FCC's orders

> "...which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve.[footnote omitted]

> The common law definition of common carrier is sufficiently deficit as not to admit of agency discretion...[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."Id., 525 F.2d at 644.

Wold does not provide otherwise. Indeed, Wold does not appear to provide any support for the Commission's proposal to allow LMDS licensees discretion concerning the status of their operations. In Wold, 735 F.2d 1471 & 1474, the court relied explicitly on the fact that both appellants acknowledged that the subject service, transponder sales, was a "non-common carrier offering." At issue in the case, was whether the FCC had the statutory authority to allow non-common carrier offerings of this type given the scarcity of the spectrum,[2] not whether the services involved could qualify as "noncommon carrier" or whether the FCC could allow entities to opt into a particular regulatory scheme.

2. **Section 332(c) may be implicated** if the proposed new service is used to provide communications for "a regularly interacting group of base, mobile, portable, and associated control and relay stations.

As noted earlier, the NPRM seeks information on the applicability of Section 332 to LMDS service. To the extent the LMDS service includes radio transmissions, for either video or non-video services, between mobile [hand-held or vehicle-mounted] stations and other mobile

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[2] Id. at footnote 10, where the court notes that "[t]he crucial question...was not whether satellite operators engaging in transponder sales would be acting as common carriers; instead, the FCC's prime task was to determine whether authorization for the proposed non-common carrier service promised sufficient public benefits to justify the assessment of scarce orbital locations and frequencies." In this case, as required in all cases, the "...FCC, with adequate record support, found it unlikely that satellite operators engaging in transponder sales will hold themselves out indifferently to serve the user public."

stations or land stations, then the applications of Section 332 private carriage, and the corresponding statutory preemption of state oversight authority, becomes a possibility - depending on the character of the service involved, i.e., a functional analysis of whether phone service is being resold at a profit and/or the proposed new service is used to provide dispatch applications and/or communications for "a regularly interacting group of base, mobile, portable, and associated control and relay stations." [3]

3. NARUC I provides the test for common carriage for the non-"Mobile Service"/ fixed portion of the proposed LMDS service.

The latest permutation of the traditional common law test for common carriage, i.e., "whether the carrier is holding itself out indifferently to serve the public", was discussed in NARUC I. As implied by the FCC in paragraph 25 of the NPRM, mimeo at 10, this common law test applies in the absence of any statutory requirements.

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[3] 47 U.S.C. Section 153(gg)(1982). In 1982, in an effort to end controversy over the standard to be applied to ascertain common carrier or private land mobile status, Congress enacted Section 332(c)(1) to provide a "...clear demarcation between private and common carrier land mobile services."House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act, 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at pages 2237, 2298 (1983). The conference report specifies that the new legislation supersedes the NARUC I test. Id. at 2299. According to the conference report "...[t]he basic distinction ...is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier." Id. Moreover, private land mobile carriers cannot be "interconnected with common carrier facilities if the licensees...are engaging in the resale of telephone service..." or "...interconnected common carrier services..." Id.

4. The FCC must tailor the regulatory classifications of LMDS based upon the service actually being offered.

Generally, NARUC agrees with the thrust of BellSouth's comments at pages 3-5 of its comments. Regardless of whether the statutory Section 332 test or the common law NARUC I test is applicable, once an LMDS service provider offers services to the public, it is the functional characteristics of those services and the manner by which they are offered that determines whether those services are common or non-common carrier services for regulatory purposes. A service provider's decision to "elect" common or private carrier status is irrelevant unless the service provider actually operates in a manner consistent with that choice. The burden of demonstrating the character of any new proposed service is, in the first instance, on the applicant. The FCC should assure that applications contain an adequate description of the functional characteristics of planned services and how the provider intends to offer those services. Only then can the FCC fulfill its obligation to assure the election is in compliance with the statutory and jurisprudential requirements.

5. Based upon the descriptions provided of the proposed new services, and the FCC's proposed requirement that licensees serve 90 percent of the residents in a service area within three years, it appears unlikely that any of the proposed services can qualify as private offerings under either Section 332 or NARUC I.

As EMF Communications Corporation notes in its comments at page 2, considering the FCC's requirement for a licensee to be able to provide service to 90 percent of residents in a service area within three years of the initial grant, it seems logical under the NARUC I test, that the

carriers be deemed common carriers, i.e., entities required to hold themselves out indifferently to serve the public.

Moreover, based upon the descriptions provided in the NPRM indicating that LMDS will become part of the PCS network,[4] particularly when viewed in light of the 90 percent service requirement, suggest that any related/supplemental mobile offerings will be unable to meet the Section 332 test. A brief review of the definition of a 153(gg) Private Land Mobile Radio service, concerning the requirements for a regularly interacting group of base, mobile, portable, and associated control and relay stations, lends additional support to this interpretation.

6. From a policy perspective, the FCC should classify LMDS generally as common carriage, leaving state jurisdiction of local communications undisturbed.

NARUC also agrees with the comments filed by Telephone and Data Systems, Inc. concerning the beneficial public policy gains that inure by classifying LMDS generally as common carriage. TDS Comments at pages 8-10. Generally, TDS suggests all LMDS services be classified as common carriage with putative private carriage offerings being dealt with on a case-by-case basis. According to TDS, this will have salutary effects, as the majority of carriers will be required to,

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[4] See, NPRM at footnote 9 & 10 and at para. 27, mimeo at 10-11. See also, NARUC's November 9, 1992 Comments "In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services" Gen Docket 90-314. As the arguments in that pleading are relevant to this proceeding, NARUC respectfully requests incorporation by references of that entire pleading. NARUC will be happy to refile the document in this docket if required.

inter alia, file just and reasonable rates, be subject to special requirements for speech and hearing disabled people, and assure access to emergency numbers. Moreover, access to competitive voice and network capabilities established under non-common carrier classifications could adversely impact quality, cost, and availability of essential public communications services.

B. PREEMPTION OF STATE OVERSIGHT:

In paragraphs 28 - 29, mimeo at 11-12, the FCC discusses the need to preempt state oversight of LMDS services.

1. The current record will not support FCC preemption of State regulation of intrastate LMDS service offerings.

   (a) Preemption, even if appropriate, is premature, pending more accurate service descriptions.

The potential preemptive reach suggested in the NPRM is far from "narrowly tailored". Indeed, the NPRM admits that "...the record in this proceeding does not contain any information regarding the extent to which state and local regulations might conflict with the provision of {NON-COMMON CARRIER} LMDS", NPRM, para. 28 mimeo at page 11, and that "...[h]aving incomplete technological information on the manner in which LMDS systems will operate, we are not in a position to determine at this time whether it is appropriate to preempt state entry and/or rate regulation of COMMON CARRIER LMDS. Moreover, we doe not have evidence that any particular state regulatory policies regarding inseverable intrastate LMDS services would thwart or impede our effort in establishing this new service".{Emphasis Added} NPRM, para. 29 mimeo at page 18.

After reviewing the extremely limited comments filed addressing this issue, NARUC submits the current record still does not support any preemptive measures.[5] As the quoted statements clearly indicate, the NPRM provides no descriptions on the nature and degree of the FCC's potential preemptive reach. Under such circumstances, NARUC respectfully suggests that the NPRM appears to place the burden on States to show why the FCC should not preempt their regulation of intrastate LMDS services - without providing a sufficiently detailed description of the services involved. To address the FCC's questions, states are placed in the untenable position of defining every conceivable form of this new service, hypothecating services characteristics, and demonstrating why such services do not drastically impede federal policy.

However, as the California decision makes clear, the burden rests with the Commission to justify any preemptive activity. In rejecting the FCC's arguments in that case, the Court stated:

> "[T]he FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals." California, at 1243.

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5 Compare, Comments of Telephone and Data Systems, Inc. at

In this case, NARUC submits that the FCC has not defined the services sufficiently or, as discussed below, articulated a sufficient rationale concerning the possible "impeding" effects of state regulation.

(b) Although the NPRM fails to articulate any potential deleterious effects of state regulation, NARUC believes that the Communications Act suggests that State input in balancing the Federal goals identified in the NPRM is required to serve the public interest.

The NPRM nowhere discusses whether or how general state regulation of PCS service would impede valid federal goal. Without additional guidance from the FCC, it is difficult to generate anything but a very general response.

However, the NPRM sets as regulatory objectives (1) satisfying customer demand, (2) expediting service to the public, (3) making more efficient use of the spectrum, and (4) streamlining the licensing process. NPRM, para. 3, mimeo at 3. Other than a statement that unspecified state laws that "conflict with federal provisions, must be preempted", nowhere does the FCC discuss the possible deleterious effects of state commission's have the authority to regulate LMDS.

NARUC believes that both the structure and history of the Communications Act requires state involvement in balancing issues of universality, speed of deployment, diversity of service and competitive delivery. However, a complete and detailed exposition of the beneficial effects of the existence of state regulatory authority over intrastate services in the abstract would only burden the record in this proceeding.

Accordingly, NARUC will await some discussion from the FCC on how state authority might impede LMDS deployment. Certainly, a bare citation to unspecified "conflicting state laws" does not constitute either an adequate record to justify preemption or the necessary fair opportunity for comment required by the Administrative Procedures Act.

2. The FCC lacks authority to preempt state authority over intrastate common carrier video/telecommunications offerings.

The FCC's legal analysis of it authority over LMDS common carriers providing TELECOMMUNICATIONS SERVICES, correctly notes it has

> "...jurisdiction only over interstate portions of the services, unless the intrastate services are not severable from the interstate services and the state regulations thwart or impede federal law and principles",

citing Louisiana v. FCC, 76 U.S. 355, 375 n.4 (1986).[6]

However, then, citing United States v. Southwestern Cable Company, 392 U.S. 17, 168-169 (1968) and New York State Commission on Cable Television v. FCC, 669 F.2d 58, 65 (2nd Cir. 1982), the FCC suggests

The 1984 Cable Act, however, only precludes states from common carriage regulation of "cable service." Cable service has a limited definition. It is either television-style entertainment or "other" service made available to all subscribers generally." 47 U.S.C. Section 522(6). Clearly, there can be video services which are not cable service, as defined. Beyond the 1984 Cable Act, the FCC's declaration that video services are interstate goes back to the late 1960s and was upheld on the basis of broadcast TV. This line of authority would not appear to apply to locally-originated video whose signals remain in-state.

According to GTE, the cases cited in the NPRM are examples of this line of authority.[7] NARUC notes that in the FCC's video dial tone

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[7] In Southwestern Cable, a pre-1984 case dealing with cable TV service, the court itself distinguishes the circumstances from the instant case, describing the interstate nature of the 1960s era cable systems, 20 L.Ed 2d 1011, 1016 when it notes:" It is enough to emphasize that the authority which we recognize to day under Section 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting...We express no views as to the commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes. {Emphasis Added}"
In this case, the Court was concerned with the FCC's authority to control the rebroadcast of over-the-air local TV in another market, an authority which the Court was very careful to limit. The court was not dealing with video signals standing alone. The circumstances presented in the Southwestern Cable case, from which the FCC's "inherently interstate" conclusory statement is derived, is easily distinguished from the proposed service. Moreover, the logical defect of using this declaration as the stated rationale to justify preemption, standing alone, is readily apparent upon even a cursory factual and legal examination. Signals, which carry electronic representations of data, voice, and video, travel daily through the local telephone company's facilities, that is, the indivisible dissemination system which forms an interstate channel of communication. Such electronic signals are the voice and data services subject to the dual inter & intrastate regulatory regime established in the Communications Act. These signals/services are not distinguishable in any meaningful sense from the signals that will be used to provide VDT and the proposed LMDS service. Indeed, like the signals currently transmitted over LECs systems, some LMDS signals will be intrastate in character. If the FCC's conclusory rationale is valid for any video service, it is difficult to discover bona fide reasons why it is not also applicable to these services, and thus why states should no longer be able regulate these basic local or intrastate interexchange service - since the same LEC facilities involved in "an interstate channel of

("VDT") proceeding, the FCC has already determine VDT is not "cable service" requiring franchising authority. Additionally, as mentioned, supra, the FCC has asked about the application of its VDT policies in this proceeding. As the Commission is aware, on October 9, 1992, NARUC asked the FCC to reconsider various aspects of its VDT order concerning preemption of State regulatory authority explaining at length the deficiencies in the FCC's rationale. In those proceedings, as in this docket the FCC cited case law that did not support its thesis.[8]

3. The FCC lacks authority, based on the current record, to preempt state authority over intrastate non-common carrier video/telecommunications offerings.

Citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), the FCC states that for LMDS choosing "Non-common carrier status", "State law which conflicts with federal provisions must be preempted", tentatively concludes that state entry and rate regulation of LMDS provision of "video entertainment programming" is preempted and then correctly notes that there is no factual record to support preemption "beyond that". Id. A record, as noted supra, that the initial comments have done little to supplement on the issue of preemption.

Even if one assumes, arguendo, that the Florida Lime case's supremacy clause analysis, apparently referenced by the FCC, is the appropriate jurisprudential test to apply here, it does not necessarily

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communication" are involved.

[8] See, NARUC's October 9, 1992 Petition for Reconsideration filed in CC Docket No. 87-266. NARUC respectfully requests this pleading also be incorporated by reference in the instant proceeding.

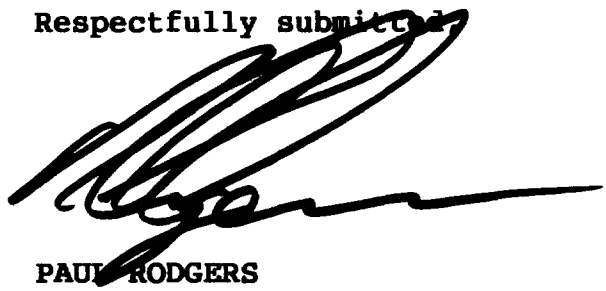
follow, particularly in the supposed "private" or "non-common carrier" context, that state entry and rate regulation of "video entertainment programming" is automatically preempted, presuming, of course, that the subject service is intrastate. As the proposed services have not been clearly articulated, it is difficult to see how the FCC could even reach a tentative conclusion, even as to entertainment programming. If the FCC chooses to continue its preemption inquiry with the Florida Lime case as a guide, NARUC notes that one, if not the divining principles of that case "...is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits not other conclusion, or that the congress has unmistakably so ordained. Id. at 257.

IV. CONCLUSION

NARUC believes that effective implementation of LMDS services requires imposition of the conditions described above. We support the

Commission's initiative in pursuing development and implementation of these new services, and respectfully request that the Commission carefully examine and give effect to these comments.

Respectfully submitted,



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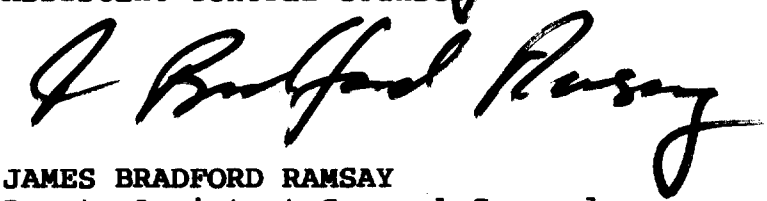

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CERTIFICATE OF SERVICE

I, CHARLES D. GRAY, certify that a copy of the foregoing was sent by first class United States mail, postage prepaid, to all parties on the attached Service List.

Charles D. Gray
Assistant General Counsel

National Association of
Regulatory Utility Commissioners

April 15, 1993